

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

February 26, 2002

IN RE:

SHOW CAUSE PROCEEDING AGAINST  
TALK.COM, INC.

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DOCKET NO.  
01-00216

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ORDER DIRECTING FILING AND  
GRANTING *MOTION FOR EXTENSION OF TIME*

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This matter came before the Pre-Hearing Officer of the Tennessee Regulatory Authority ("Authority") upon the filing on February 19, 2002 of both the *Initial Response of Talk.com* ("Initial Response") and the *Motion to Dismiss of Talk.com* ("Motion to Dismiss"), as well as the filing on February 20, 2002 of *The Consumer Services Division's Motion for Extension of Time* ("Motion for Extension of Time").<sup>1</sup> Each filing will be individually addressed in the following sections.

**Initial Response**

Filed on February 19, 2002, the Initial Response is Talk.com's substantive response to the Authority's November 8, 2001 *Order Requiring Talk.com to Appear and Show Cause Why a Cease and Desist Order and/or Fine Should Not be Imposed* ("Show Cause Order").<sup>2</sup> By agreement of the parties at the Pre-Hearing Conference of December 19, 2001, the Initial Response was due on February 19, 2002, as memorialized in the Pre-Hearing Officer's *Order*

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<sup>1</sup> Hereinafter, the Consumer Services Division of the Tennessee Regulatory Authority will be referred to as "CSD", and the Consumer Advocate and Protection Division of the Office of the Attorney General, an intervenor in this case, will be referred to as the "Consumer Advocate".

<sup>2</sup> The body of the Show Cause Order is one hundred sixteen (116) pages and addresses counts 1-149. Exhibits filed with it are estimated to number much more than a thousand pages. (See footnote 3).

*Establishing Procedural Schedule* of January 3, 2002, the *Order Supplementing Procedural Schedule* of February 11, 2002, and the *Order Granting Joint Motion to Amend Procedural Schedule* of February 14, 2002.

In paragraph 2 (pages 1-2) of its Initial Response, Talk.com describes this filing as follows:

This Response is divided into two parts. First, in the body of this document, Talk.com addresses the legal standards applicable to the Slamming, Cramming and "Do Not Call" Counts alleged in the Show Cause Order. This portion of the Response also addresses facts or arguments common to many of the individual complaints alleged, as well as arguments relating to the CSD's calculation of a proposed penalty for the alleged violations. Second, attached as **Exhibit A, Tabs 1-34** are summaries of Talk.com's factual and legal position with respect to each of the individual complaints set forth in the Show Cause Order. For the Authority's convenience, these summaries are numbered in the same order as the complaints are discussed in the Show Cause Order. The summaries also contain additional factual information relevant to the review of the complaints set forth in the Show Cause Order. (footnotes omitted)

The Pre-Hearing Officer finds that this is an apt description of this filing. The body of the Initial Response totals eighty-two (82) pages and addresses various categories of 120 of the counts. Exhibit A, Tabs 1-34, which addresses each of the 120 counts individually, is estimated to number more than two thousand pages.<sup>3</sup> Without commenting on the merits of the Initial Response, the Pre-Hearing Officer finds this document to be voluminous, and that any substantive analysis will be extremely time-consuming.

Through the Initial Response, Talk.com raises a number of defenses that should be analyzed and publicly addressed by the CSD, and potentially by the Consumer Advocate, prior to a hearing in this matter. As Talk.com had approximately three and a half months (104 days) to respond to the Show Cause Order, the Pre-Hearing Officer finds that it would be reasonable to

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<sup>3</sup> Neither the collective exhibits nor tabs attached to the Show Cause Order and/or the Initial Response have cumulative, consecutive page numbers, so short of counting each page, this is a reasonable estimate of the length of these documents.

expect a substantive reply to the Initial Response within forty-five (45) days of its filing. Therefore, the CSD is directed to reply to the Initial Response, and the Consumer Advocate is invited to reply, no later than April 5, 2002.

### **Motion to Dismiss**

Filed concurrently with the Initial Response, Talk.com filed its Motion to Dismiss relative to twenty-seven (27) cramming counts for lack of subject matter jurisdiction, alleging that the Federal Communications Commission ("FCC") has exclusive cramming jurisdiction over mixed bundles of interstate and intrastate communications services. Through the Motion to Dismiss, Talk.com also requested that two (2) counts of slamming be dismissed on the grounds that these counts should be barred due to an earlier settlement involving the Authority and Access One Communications.

### **Motion for Extension of Time**

The following day, February 20, 2002, the CSD filed its Motion for Extension of Time, requesting an additional ten (10) days to respond to the Motion to Dismiss pursuant to the Authority's Rule 1220-1-2-.06(2). Generally, that rule provides any party opposing a motion seven (7) days to respond to such motion, but the rule specifically states that the "Hearing Officer may shorten or extend the time for responding to any motion."<sup>4</sup>

While arguably a "preliminary" motion, a motion to dismiss, similar to a motion for summary judgment, could result in either the dismissal of a case or substantially disposing of the merits of a case. That is why an order dealing with such a motion is by rule "not an interlocutory order and any such order issued by a Hearing Officer shall be considered as an initial order subject to review by the Authority as specified in § 4-5-315."<sup>5</sup> As such, a motion to dismiss

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<sup>4</sup> Tenn. Comp. R. & Reg. 1220-1-2-.06(2).

<sup>5</sup> Tenn. Comp. R. & Reg. 1220-1-2-.06(7).

should be held to greater scrutiny than other preliminary motions, and an opposing party should be allowed sufficient time for thorough analysis and response.

In the instant case, Talk.com filed its Motion to Dismiss with its Initial Response -- in fact, it filed the Motion to Dismiss in lieu of a substantive response to twenty-nine (29) counts contained in the Show Cause Order. While it could have filed its Motion to Dismiss at any time in the past three months, Talk.com choose to file it as a part of its response. For that reason, the Motion to Dismiss could be treated no differently than the Initial Response, to which, as ordered in the above section, the parties have forty-five (45) days to reply.

Notwithstanding the above reason, the Pre-Hearing Officer has attempted to move this docket along quickly, and a month and a half would be excessive for a twenty-four page motion. Furthermore, while the Motion to Dismiss addresses twenty-nine (29) counts, in essence it primarily raises two issues. Finally, although the parties "have agreed not to oppose" CSD's request for an extension of time, Talk.com requests that a response from CSD be required by March 4, 2002 (immediately prior to the March 5, 2002 Pre-Hearing Conference).<sup>6</sup> As the Pre-Hearing Officer does not intend to address the substance of the Motion to Dismiss at that Pre-Hearing Conference, that deadline is not relevant; nevertheless, Talk.com's opposition to a lengthy time for the CSD to respond to its motion is duly noted.

Considering the positions of the parties as well as the equities, the Pre-Hearing Officer grants the CSD's request for an additional ten (10) days to respond to the Motion to Dismiss.

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<sup>6</sup> Henry Walker, Esq., local counsel for Talk.com, telephoned the Pre-Hearing Officer at approximately 5:40 p.m. Friday, February 22, 2002 to inform the Pre-Hearing Officer that the Consumer Advocate did not oppose the CSD's Motion for Extension of Time, and Talk.com would not oppose an extension until March 4, 2002, in order that such motion and response could be addressed at the Pre-Hearing Conference scheduled for the following day. The Pre-Hearing Officer directed Mr. Walker to memorialize Talk.com's position and file it with the Authority; Mr. Walker did that by way of letter dated February 25, 2002.

The Consumer Advocate may also respond, but any such response shall be filed no later than 2:00 p.m. on March 8, 2002.

**Inapplicability to the Procedural Schedule**

The above rulings do not in any way modify the *Order Granting Joint Motion to Amend Procedural Schedule* of February 14, 2002 ("Order") or the underlying procedural schedule. Neither a "reply to the Initial Response" nor a "Motion to Dismiss" was listed in or required by the procedural schedule, and any directive found in the Order referred specifically to all items listed in the amended procedural schedule as set forth in that Order. If there was any confusion about this matter, counsel could have requested a clarification<sup>7</sup> from the Pre-Hearing Officer, who would have shared such a clarification with all the parties.

**IT IS THEREFORE ORDERED THAT:**

1. The Consumer Services Division is directed to reply to the *Initial Response of Talk.com*, and the Consumer Advocate Division is invited to reply, no later than 2:00 p.m. on April 5, 2002;

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<sup>7</sup> In footnote 1 to the Motion for Extension of Time, counsel for CSD presume that an "arbitrary ten (10) day rule" has been unfairly imposed for the first time. The Pre-Hearing Officer refers counsel to Hearing Officer Wike's *Order Establishing Procedural Schedule* issued on November 8, 2001 in Docket No. 01-00913. In that Order, the Hearing Officer states: "**In no event** shall the extensions of time granted to any party exceed a total of ten (10) days." (emphasis added). To the extent that a similar directive applies in the instant docket, as early as January 3, 2002 this Pre-Hearing Officer put the parties on notice by stating: "Extensions of time exceeding a cumulative total of ten (10) days shall not be granted." Exercising his discretion in this case, the Pre-Hearing Officer has limited extensions of time (e.g., for scheduling problems, settlement negotiations, etc.), but this limitation does not preclude a request for a time extension when **good cause** is shown, otherwise language such as "in no event" or "under no circumstances" would have prefaced the directive. ("Good cause" implies a showing of extraordinary circumstances, such as but not limited to: an unexpected hospitalization, a settlement agreement that is simply awaiting memorialization, etc.) In light of the foregoing, footnote 1 is moot and simply not relevant to the disposition of the Motion for Extension of Time.


2.     *The Consumer Services Division's Motion for Extension of Time* to respond to the *Motion to Dismiss of Talk.com* is granted. The Consumer Advocate Division may also respond, but all such responses shall be filed no later than 2:00 p.m. on March 8, 2002; and

3.     The above rulings do not in any way modify the *Order Granting Joint Motion to Amend Procedural Schedule* of February 14, 2002 or the underlying procedural schedule.



Gary Hotvedt, Pre-Hearing Officer

ATTEST:



K. David Waddell, Executive Secretary